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In The

SUPREME COURT OF THE UNITED STATES

JANUARY TERM, 1948

No.----------

STATE OF NEBRASKA, PETITIONER,

V.

UNITED STATES OF AMERICA, CLARA H. McNISH, T. C. SPIKER, AND RUSH C. CLARKE, SPECIAL ADMINISTRATOR OF THE ESTATE OF OLIVE E. JONES, DECEASED.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH JUDICIAL CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

WALTER R. JOHNSON,
Attorney General of Nebraska,
C. S. BECK,
Deputy Attorney General of Nebraska,
ROBERT A. NELSON,
Assistant Attorney General of Nebraska,
Attorneys for Petitioner.

PETITION FOR WRIT OF CERTIORARI.

May it Please the Court:

The petition of the State of Nebraska respectfully shows to this Honorable Court:

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

On the 15th day of April, 1942, the United States of America filed a petition in condemnation in the United States District Court, District of Nebraska, North Platte Division, whereby it sought to acquire title to 19,573.59 acres of land, more or less, situated in Cheyenne County, State of Nebraska. Only Tracts 27 and 69 are involved in this action. Each of said tracts consists of a section of the public school lands of the State of Nebraska, which were granted to the State by the United States government, in trust, for the benefit of the public schools. This land was leased by the State of Nebraska to various persons who are all parties to the action.

On the 15th day of April, 1942, an order for immediate possession of said land was entered by the court. Subsequently, appraisers were appointed, a hearing had before said appraisers; the report of appraisers was filed on the 3rd day of October, 1944, and an amendment to the report was filed on the 7th day of November, 1944. From the award of appraisers, the State of Nebraska and all of the lessees appealed. Trial of said cause was commenced in the United States District Court of the District of Nebraska, North Platte Division, on the 7th day of October, 1946, and submitted to the jury on the 8th day of October, 1946.

At the completion of the trial, the court instructed the jury that the State of Nebraska was entitled to recover only the fair and reasonable market value of the

land at the time of the taking, less the fair and reasonable market value of the leasehold interests (R. 75). The jury returned a verdict which found the fair and reasonable market value of the land to be the total sum of $38,400.00 and of this amount awarded to the State of Nebraska the sum of $26,880.00 and to the various lessees the sum of $11,520.00 (R. 51,52). Upon this verdict judgment was entered by the court.

The State of Nebraska filed a motion for a new trial (R. 63) which was overruled by the court with a written opinion (R. 66). Upon appeal the United States Circuit Court of Appeals for the Eighth Circuit affirmed on the 23rd day of December, 1947 (R. 219-226).

B.

REASONS RELIED ON FOR ISSUANCE OF THE WRIT.

1. The decision of the Circuit Court of Appeals ignores the construction by the Supreme Court of Nebraska of the provisions of the Nebraska Constitution relating to the common school trust.

The Supreme Court of Nebraska has construed the terms and conditions of the grant by the United States government of Sections 16 and 36 in each township of the state, and the provisions of the Constitution of the State of Nebraska relating thereto, as imposing an obligation upon the state to keep this trust forever inviolate and undiminished, and the State is required to supply all losses thereof, that may in any manner accrue. These lands cannot be diverted to any other purpose, either public or private, and the full value must be received

by the trust for any land sold or taken through eminent domain proceedings. (See *State, ex rel., Johnson* v. *Central Nebraska Public Power and Irrigation District*, 143 Neb. 153, 8 N. W. (2d) 841; *State* v. *Platte Valley Public Power and Irrigation District*, 147 Neb. 289, 23 N. W. (2d) 300.) In the latter case the identical question here presented was involved and the court held that the State, through the issuance of a school land lease, could not give to the lessee any interest in the land which could be deducted from the fair market value due the school trust when such lands were taken through condemnation proceedings.

The decision of the lower court in the instant case entirely ignores this construction of the provisions of the Nebraska Constitution made by the Supreme Court of Nebraska.

2. The decision of the Circuit Court of Appeals ignores the construction by the Supreme Court of Nebraska of Sections 72-204, 72-205, 72-232, and 72-234, Revised Statutes of Nebraska, 1943, with reference to the interest which a lessee of school lands of the State has in a school land lease.

The above-mentioned sections of the Nebraska Statutes provide the manner of determining the rental to be paid by a lessee of school lands. At the time of the trial of the instant case, school lands were leased for a period of twenty-five years, the rental being based upon six per cent of an appraised value, which value may be changed by the Board of Educational Lands and Funds (the public officials in charge of the trust) at any time they deem it to the best interests of the trust. In *State* v. *Platte*

Valley Public Power and Irrigation District, supra, the Supreme Court of Nebraska held that these statutes clearly disclosed that the Legislature intended that the appraised value should at all times be the fair market value of the land, and that the lessee could acquire no property right in the lease compensable in a condemnation proceedings unless he could show that his leasehold had a *use* value over and above the rent reserved in the lease. This construction of the Nebraska Statutes as to the rights and interest of a lessee in a school land lease was binding upon the federal court. The record discloses, however, that the witnesses who testified in behalf of the lessees, over objections, based their opinions as to the value of the leases upon their knowledge of sales of such leases held in the past, and not upon the use value over and above the rent reserved in the lease (R. 118-122).

3. The decision of the Circuit Court of Appeals is in violation of the Fifth Amendment to the Constitution of the United States in that it authorizes the taking of private property for public use without just compensation.

Section 9, Article VII of the Constitution of the State of Nebraska, provides in part as follows:

> "All funds belonging to the state for educational purposes, the interest and income whereof only are to be used, shall be deemed trust funds held by the state, and the state shall supply all losses thereof, that may in any manner accrue, so that the same shall remain forever inviolate and undiminished; * * *."

No compensation was ever paid to the State for any interest in these leased lands, and therefore the taking of the same by the United States without full compensation will deplete the trust and place an obligation upon the taxpayers of the State to supply such loss. To create a liability upon the taxpayers has the same effect as taking their property—loss accrues. The decision of the lower court, therefore, is in violation of that provision of the Fifth Amendment which prohibits the taking of private property for public use without just compensation.

4. The majority of the states have lands which were granted to them by the United States, in trust for the benefit of the common schools of their states, under terms and conditions similar to those included in the grant to the State of Nebraska. The question involved is, therefore, one of great public interest and the precise question has never been, but should be, settled by this court.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding that court to send to this court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 13,578 Civil, *State of Nebraska, appellant* v. *United States of America, et al., appellees,* and that the said decree of the United States Circuit Court of Appeals may be reversed by this Honorable Court, and that your petitioner may have such other and further relief ir

the premises as to this Honorable Court may seem meet and just.

By WALTER P. JOHNSON
Attorney General of the State of Nebraska

By C. S. BECK
Deputy Attorney General of the State of Nebraska

By ROBERT A. NELSON
Assistant Attorney General of the State of Nebraska

In The

SUPREME COURT OF THE UNITED STATES

JANUARY TERM, 1948

STATE OF NEBRASKA, PETITIONER,

V.

UNITED STATES OF AMERICA, CLARA H. McNISH, T. C. SPIKER, AND RUSH C. CLARKE, SPECIAL ADMINISTRATOR OF THE ESTATE OF OLIVE E. JONES, DECEASED.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

THE OPINIONS OF THE COURTS BELOW.

The opinion of the District Court (R. 52) entitled *United States of America* v. *19,573.59 Acres of Land, More or Less, Situated in Cheyenne County, State of Nebraska,* is reported in 70 F. Supp. 610, and the opinion of the United States Circuit Court of Appeals (R. 219) entitled *State of Nebraska* v. *United States of America, et al.,* is reported in 164 F. (2d) 866.

II.

JURISDICTION.

The jurisdiction of the District Court rests upon the condemnation act of August 1, 1888, 25 Stat. 357, 40

U. S. C. A., Sec. 257, and the jurisdiction of the Circuit Court of Appeals was invoked under Sec. 128 of the Judicial Code, as amended, 28 U. S. C. A., Sec. 225 (a). The jurisdiction of this court is invoked under Sec. 240 of the Judicial Code, as amended, 28 U. S. C. A., Sec. 347 (a).

The date of the decision to be reviewed is December 23, 1947.

III.

STATEMENT OF THE CASE.

The statement of the case is contained in our petition for writ of certiorari and therefore, for sake of brevity, will not be repeated here.

IV.

SPECIFICATION OF ERRORS.

1. The court erred in ignoring the construction by the Supreme Court of Nebraska of the enabling act of Congress passed on the 19th day of April, 1864, and the provisions of the Constitution of the State of Nebraska relating thereto.

2. The court erred in failing to recognize the construction by the Supreme Court of Nebraska of the Nebraska Statutes with reference to the leasehold interest of a lessee of school lands.

3. The rule adopted by the lower court with reference to the measure of damages to the State of Nebraska is in violation of the Fifth Amendment to the Constitution of the United States in that it authorizes the taking

of private property for public use without just compensation.

V.

ARGUMENT.

Point A.

The federal court is bound by the construction made by the Supreme Court of Nebraska of the enabling act of Congress passed on the 19th day of April, 1864, and the provisions of the Constitution of the State of Nebraska relating thereto.

Section 7, enabling act of Congress, April 19, 1864.

Section 1 (under "Education"), Constitution of State of Nebraska (1866).

Section 21, Article III, Constitution of State of Nebraska (1875).

Section 2, Article VII, Constitution of State of Nebraska (1875).

Section 3, Article VII, Constitution of State of Nebraska (1875).

Section 9, Article VII, Constitution of State of Nebraska (1875).

Section 8, Article VII, Constitution of State of Nebraska (1920).

State v. *Tanner*, 73 Neb. 104, 102 N. W. 235.

State, ex rel., Johnson v. *Central Nebraska Public Power and Irrigation District*, 143 Neb. 153, 8 N. W. (2d) 841.

State v. *Platte Valley Public Power and Irrigation District*, 147 Neb. 289, 23 N. W. (2d) 300, 166 A. L. R. 1196.

The lands involved in the instant case are a part of the common school lands granted to the State of Nebraska by the enabling act of Congress. In order to determine the questions involved, it becomes necessary to consider the conditions of this grant, together with the provisions of the Nebraska Constitution with reference to this trust, and the interpretation of these provisions made by the Supreme Court of Nebraska.

Section 7 of the enabling act of Congress, which permitted the territory of Nebraska to attain statehood, passed April 19, 1864, provides as follows:

> "And be it further enacted, That sections number sixteen and thirty-six in every township, and when such sections have been sold or otherwise disposed of by any act of Congress, other lands equivalent thereto, in legal sub-divisions of not less than one quarter section, and as contiguous as may be, shall be, and are hereby, granted to said state for the support of common schools."

This provision, together with the other provisions of the enabling act, were accepted by the Legislature of the State of Nebraska. The original State Constitution of Nebraska (1866), which was approved by the act of admission, contained the following:

> "Sec. 1 (under 'Education'). The principal of all funds arising from the sale, or other disposition of lands or other property, granted or intrusted to this state for educational and religious purposes, shall forever be preserved inviolate and undiminished; and the income arising therefrom shall be faithfully applied to the specific objects of the original grants or appropriations. The legislature shall make such provisions, by taxation or otherwise, as, with the income arising from the school trust-fund,

will secure a thorough and efficient system of common schools throughout the State; but no religious sect or sects shall ever have any exclusive right to or control of any part of the school-funds of this State."

By these acts the title to the common school lands became vested in the State of Nebraska as trustee for the benefit of the common schools of the State. The terms of the grant became a binding contract between the United States of America and the State of Nebraska by which the State agreed to preserve inviolate and undiminished the principal of the school endowment lands and their proceeds.

The second Constitution of Nebraska (1875) contained the following provisions:

Article III, Section 21:

"Lands under control of the state shall never be donated to railroad companies, private corporations or individuals."

Article VII, Section 2:

"All lands, money or other property granted, or bequeathed, or in any manner conveyed to this state for educational purposes, shall be used and expended in accordance with the terms of such grant, bequest, or conveyance."

Article VII, Section 3:

"The following are hereby declared to be perpetual funds for common school purposes of which the annual interest or income only can be appropriated, to-wit:

"First. Such per centum as has been, or may hereafter be, granted by Congress on the sale of lands in this state.

"Second. All moneys arising from the sale or leasing of sections number sixteen and thirty-six in each township in this state, and the lands selected, or that may be selected, in lieu thereof.

"Third. The proceeds of all lands that have been, or may hereafter be, granted to this state, where by the terms and conditions of such grant the same are not to be otherwise appropriated."

Article VII, Section 9:

"All funds belonging to the state for educational purposes, the interest and income whereof only are to be used, shall be deemed trust funds held by the state, and the state shall supply all losses thereof, that may in any manner accrue, so that the same shall remain forever inviolate and undiminished; and shall not be invested or loaned except on United States or state securities; or registered county bonds of this state, or registered school district bonds of this state; and such other securities as the Legislature may from time to time direct. * * *"

The Nebraska Constitution of 1920 retained the provisions of the Constitution of 1875, above quoted, and in addition thereto contained the following provision, which is applicable to the question at bar:

Article VII, Section 8:

"No lands now owned or hereafter acquired by the state for educational purposes shall be sold except at public auction under such conditions as the Legislature shall provide."

These provisions constitute a binding obligation between the State and the federal government, and this obligation has been recognized by the Supreme Court of Nebraska from the earliest times.

In *State* v. *Tanner,* 73 Neb. 104, 102 N. W. 235, Justice Holcomb, speaking of the common school lands, stated:

> "* * * These lands are granted to the state for a sacred purpose. They are held in trust for the benefit of the common schools. This trust is by the constitution declared to be inviolable. Congress has by this act expressly made provisions for the state to secure more nearly its full quota of school lands, as originally contemplated. The grant has been accepted and the lands selected, and it would seem that the state cannot escape the responsibility thus thrown upon it, and cannot do otherwise than execute the trust with which it is charged in harmony with the provisions of the fundamental law."

Also in *State, ex rel., Johnson* v. *Central Nebraska Public Power and Irrigation District,* 143 Neb. 153, 8 N. W. (2d) 841, Justice Yeager states as follows:

> "With regard to the public school fund derived from sale or income from public school lands which received the same constitutional treatment as the lands, this court has said: 'The provisions of the enabling act making the grant, and of the Constitution of 1866 setting apart and pledging the principal and income from such grant * * *, and the subsequent act admitting the state into the Union under such Constitution constituted a contract between the state and the national government relating to such grants. By section 1, art. XVI (XVIII) of the Constitution of 1875, it was "ordained and declared" that "all laws in force at the time of the adoption of this Constitution, not inconsistent therewith, and

all * * * contracts of this state * * * shall continue to be as valid as if this Constitution had not been adopted." This provision carried forward into the new Constitution the pledge made in the Constitution of 1866.' State v. Brian, 84 Neb. 30, 120 N. W. 916.

"It therefore follows that by reason of this the state was and still is under a contractual as well as a constitutional obligation to refrain from disposition or alienation of the use of this property except as allowed by the enabling act and the Constitution."

A case identical with the case at bar is *State* v. *Platte Valley Public Power and Irrigation District,* 147 Neb. 289, 23 N. W. (2d) 300, 166 A. L. R. 1196. This case involved the taking of state school lands through eminent domain proceedings by a public power and irrigation district. The State District Court tried the case upon the same theory as did the United States District Court in the instant case; namely, the jury was instructed to determine the fair market value of the land, then determine the value of the leasehold interest, and deduct such leasehold interest and award the balance to the state. In reversing the case the Supreme Court of Nebraska reiterated several of the rules previously laid down by the court as hereinbefore discussed. With reference to the measure of damages to the State, the court said:

"* * * *The state must receive the fair market value of the leased premises at the time of the taking, less certain reservations to be hereinafter noted. That value belongs to the state, not to the lessee.* The state is without power to alienate these lands without reeciving their full value; *it cannot reduce that value nor alienate it in part by lease, and these lands cannot be taken from the state by judicial process unless that value is paid to the state.* Ob-

viously the board, under the leasing provision of the statute, *is without authority to sell, directly or in effect, a part of the fee.* The provisions for reappraisement and the payment of variable rents based on the reappraised value shows clearly a legislative intent, which the lessee recognized by his lease contract, that the increased value of the premises should at all times belong to the state. *For the state to receive less than that fair market value would be to invade the trust property and violate the obligation of the trust that binds it.* The trial court erred in receiving evidence and in permitting the jury to fix the value of the state's recovery herein, based on the premise that the appraised value and the rents reserved to the state fixed the value of the state's interest in the land." (Emphasis supplied.)

The court concluded:

> *"Summarizing. The state's interest for which the condemnor must make compensation in this action is the fair market value of the leased premises taken, less the value of the mineral rights, if any, and less the value of the reverter, if any.* * * *" (Emphasis supplied.)

The reservations referred to in the above quotation, namely, the mineral rights upon the land and the condition that if the lands condemned ceased to be used for the purpose for which they were taken they shall revert to the State, are not involved in the instant action, since the government is taking the entire fee without any reservation.

Point B.

The federal court is bound by the construction made by the Supreme Court of Nebraska of the Nebraska

Statutes with reference to the leasehold interest of a lessee of school lands.

Article 2, Chapter 72, Revised Statutes of Nebraska, 1943.

Section 72-204, Revised Statutes of Nebraska, 1943.

Section 72-205, Revised Statutes of Nebraska, 1943.

Section 72-232, Revised Statutes of Nebraska, 1943.

Section 72-234, Revised Statutes of Nebraska, 1943.

State v. *Platte Valley Public Power and Irrigation District*, 147 Neb. 289, 23 N. W. (2d) 300, 166 A. L. R. 1196.

Boston Chamber of Commerce v. *Boston*, 217 U. S. 189, 54 L. Ed. 725, 30 S. Ct. 459.

United States, ex rel., T. V. A. v. *Powelson*, 319 U. S. 266, 87 L. Ed. 1390, 63 S. Ct. 1047.

Baltimore City v. *Latrobe*, 101 Md. 621, 61 A. 203.

City of St. Louis v. *Brown*, 155 Mo. 545, 56 S. W. 298.

Nichols on Eminent Domain (2nd Ed.), Volume 1, Section 231.

The provisions for leasing of school lands in the State of Nebraska which were controlling at the time of the taking of the lands involved herein by the United States government are found in Article 2, Chapter 72, Revised Statutes of Nebraska, 1943.

Sec. 72-204. "When the Board of Educational Lands and Funds deems it to the best interest of

the state, it may cause any lands not under sale contracts, the leasing of which is regulated by sections 72-232 to 72-239, to be appraised or reappraised. When the board has ordered the appraisement or reappraisement of any of the educational lands in any county, it shall prescribe the method and promulgate rules governing the classification of educational lands. It shall have a classification of all the educational lands in the county prepared by a competent person, who shall make a detailed field examination of each forty-acre tract of educational lands for the purpose of obtaining information as to the type and rating of the soil, its adaptability, the topographical character of the land, and the location and number of acres of each type. His report of such field examination shall be prepared in the form of a detailed map with complete explanations, and shall be filed with the board."

Sec. 72-205. "When the Board of Educational Lands and Funds deems it expedient to rase or lower the valuation of school lands in any county, the board, or its authorized representative, shall hold a meeting in the county seat of the county where such school lands, or any portion thereof, are located, and shall sit jointly in special session with the county commissioners or county supervisors, as a board, to take testimony and to receive evidence as to the value of all school lands, according to classification, in such county or counties. The county board shall make recommendations as to the value of such school lands, according to classification, always considering the sale price of other lands in the county, the average crop production, and the rental value of other lands similarly situated, to the Board of Educational Lands and Funds, which is specifically authorized and empowered to lower or raise such valuations in its discretion. * * *"

Sec. 72-232. "All unsold lands shall be subject to lease at an annual rental of six per cent on the appraised value, except as hereinafter provided. * * *"

Sec. 72-234. "* * * Each lease shall contain a covenant or provision that * * * and that the premises will be surrendered at the expiration of twenty-five years from the first day of January next ensuing after the date of lease, or sooner, with the consent of the board."

Construing these statutory provisions, the Nebraska court, in *State* v. *Platte Valley Public Power and Irrigation District*,, supra said:

"It is clear from an analysis of these statutory provisions that the administrative determination of the value of the school lands by appraisement is for the purpose of securing a value as a basis for fixing the annual rent. It is obvious that the legislative intent was that the appraised value should be at all times the fair market value of the leased premises, and that the state should receive a six per cent return upon that value. It likewise is obvious that the appraised value of the land involved in this action is far below its fair market value as reflected by all the evidence. *However, the administrative determination of value for rent purposes does not fix the value which the state must receive for the land when it is taken in eminent domain proceedings.* * * *" (Emphasis supplied.)

In the same case, with reference to the measure of damage to the lessee, the court said:

"Under these conditions there can be no difference between the rental value of the remainder of the term and the rent reserved in the lease, unless it be shown that the value of the use based upon

> the fair market value of the land is more than the six per cent required by the statute as the rental value of the use. However, there is some evidence here that the value of the use based upon the fair market value of the land is more than the six per cent required by the statute as the rental value of the use. If that fact were established, then we are of the opinion that this value of the use belongs to the lessee under his lease, and that he is entitled to recover its fair market value, if any, for the remainder of the term. Where the rent reserved equals or exceeds the rental value, the lessee has suffered no loss and cannot recover. 29 C. J. S., Eminent Domain, § 143, note 71 (3), p. 989."

The Nebraska court has therefore established a rule in the taking of school lands through eminent domain proceedings which might, in case the lessee establishes a use value of the lands which is over and above six per cent per annum of the fair market value of the leased premises, require the condemner to pay damages in excess of the value of the fee. The court adopts the theory that "it is the owner's loss, not the taker's gain," which is the measure of compensation for the property taken, and cites as authority *Boston Chamber of Commerce* v. *Boston*, 217 U. S. 189, 54 L. Ed. 725, 30 S. Ct. 459; *United States, ex rel. T. V. A.* v. *Pohelson*, 319 U. S. 266, 87 L. Ed. 1390, 63 S. Ct. 1047; *Baltimore City* v. *Latrobe*, 101 Md. 621, 61 A. 203; and *City of St. Louis* v. *Brown*, 155 Mo. 545, 56 S. W. 298.

Nichols on Eminent Domain (2nd Ed.), Volume 1, Section 231, presents the question in a concise manner as follows:

> "It was formerly looked upon as one of the most firmly established principles of the law of eminent

domain, and it is still the law in ordinary cases, that when a tract of land is taken by eminent domain, as the land itself is taken by a paramount title rather than the separate estates of different persons having interests in the land, the compensation awarded is for the land itself, and not for the sum of the different interests therein. The duty of the public to make payment for the property which it has taken is not, it is said, affected by the nature of the title or by the diversity of interests in the property. The public pays what the land is worth, and lets the amount so paid be divided among the various claimants, according to the nature of their respective estate. * * *

* * *

"The rule however apparently is not of universal application. It has always been the practice to deny the owner of the fee of land taken by eminent domain the full market value of the land if it was subject to an encumbrance which diminished its value, even if the encumbrance was not of such nature that the person for whose benefit it was created was entitled to share in the compensation. So also it was never the practice, when a private street was taken over for a public highway, to award as compensation the value of the land included in the street, in accordance with the price of private land per square foot prevailing in the neighborhood, to be divided between the owner of the fee and the owners of lots to which rights of way over the street were appurtenant. On the contrary each party was limited to the damages which he had actually suffered. The constitutionality of this method of limiting the damages was sustained by the Supreme Court of the United States in a case in which it appeared that there had been taken for highway purposes a tract of land subject to a restriction against the erection of any building thereon in favor of the owners of an adjoining building. The owners

of the land taken and of the land upon which the building stood joined in asking for compensation, and contended that they were entitled to the full value of the land, but the court denied that either party was entitled to recover more than the damages actually suffered by him, which were of course almost nominal. (Boston Chamber of Commerce v. Boston, 217 U. S. 189, 54 L. Ed. 725.)

"This decision seems manifestly just, but does the principle which it enunciates work both ways? Is the owner of an estate or interest in real estate, constituting 'property' in the constitutional sense, to be denied his full measure of compensation because of conditions affecting the interest of some one else in the same real estate? Such a case may readily arise in the states in which benefits to the remaining land may be set off from the value of the land taken, since a public improvement for which part of a tract is taken may be of such benefit to the land as a whole that no compensation is awarded, and yet it may injuriously affect the value of a leasehold interest in the property, without a corresponding benefit. Is the tenant in such a case to be denied compensation? So also, even apart from questions of benefits, cases may arise in which the owner of the fee is entitled to the full market value of the land and yet the holder of some other estate or interest in the property may be fairly entitled to compensation, and in one state at least the court has allowed it. (Baltimore v. Latrobe, 101 Md. 621, 61 A. 203.) The law upon this point may thus be said to be in a formative state." (Emphasis supplied.)

Point C.

Lands belonging to the public school trust of a state cannot be taken by the United States of America through condemnation proceedings without just ompensation.

Erie Railroad Company v. *Tompkins,* 304 U. S.

64, 82 L. Ed. 1188, 58 S. Ct. 817.

State, ex rel. Johnson v. *Central Nebraska Public Power and Irrigation District*, 143 Neb. 153, 8 N. W. (2d) 841.

State v. *Platte Valley Public Power and Irrigation District*, 147 Neb. 289 23 N. W. (2d) 300, 166 A. L. R. 1196.

Constitution of the United States, Fifth Amendment.

Section 9, Article VII, Constitution of State of Nebraska.

Section 72-264, Revised Statutes of Nebraska, 1943.

Town of Bedford v. *United States of America*, 23 F. (2d) 453, 56 A. L. R. 360.

Jefferson County, Tennessee v. *Tennessee Valley Authority*, 146 F. (2d) 564.

Seaboard Air Line Ry. Co. v. *United States*, 261 U. S. 299, 67 L. Ed. 664, 43 S. Ct. 354.

The Supreme Court of Nebraska has placed its construction upon the provisions of the Constitution of the State relating to the questions herein presented. The Nebraska court has held that the Legislature of the State and the officers charged with the administration of the trust are powerless to convey any interest in the school lands without full compensation. The federal courts are bound by this interpretation of the State Constitution and laws. In *Erie Railroad Company* v. *Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817, this court said:

> "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And

> whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts. * * *"

The Nebraska court has construed the obligation imposed by the enabling act which granted the school lands to the State and the acceptance of the same by the State as a binding contract between the federal government and the State of Nebraska. It has ruled that the Legislature is without power to give to any person or corporation, public or private, any right or interest in these lands without full compensation. *State, ex rel. Johnson* v. *Central Nebraska Public Power and Irrigation District,* 143 Neb. 153, 8 N. W. (2d) 841; *State* v. *Platte Valley Public Power and Irrigation District,* 147 Neb. 289, 23 N. W. (2d) 300. The trial court adopted the theory that the public officials of the State, through issuance of the school land leases involved, had conveyed to these lessees an interest in these lands, the value of which should be deducted from the fair market value of the lands when such lands were taken by the United States government through eminent domain proceedings. What public officials of the State were prohibited from doing directly, even under legislative enactment, certainly they could not do indirectly through the issuance of these leases.

The federal government cannot dispossess a state of the control and use of its public property, or its trust

property, and appropriate the same to the federal government's own benefit without payment of full compensation therefor. The Fifth Amendment to the Constitution of the United States provides in part:

> "* * * nor shall private property be taken for public use, without just compensation."

Heretofore we have pointed out that the rule adopted by the Nebraska court furnishes just compensation to both the State and the lessee. We will now limit our argument to the question of what is "just compensation" insofar as the State of Nebraska is concerned.

Section 9, Article VII of the Constitution of Nebraska provides:

> "All funds belonging to the state for educational purposes, the interest and income whereof only are to be used, shall be deemed trust funds held by the state, and the state shall supply all losses thereof, that may in any manner accrue, so that the same shall remain forever inviolate and undiminished; * * *."

The Nebraska State Legislature has recognized the duty imposed upon it by the above quoted constitutional provision, and at the Fifty-sixth Session, 1943, it made provisions for a special tax levy to replace all losses which had accrued to the permanent school fund to that date. This enactment is found in Section 72-264, Revised Statutes of Nebraska, 1943, and reads as follows:

> "The State Board of Equalization shall make a levy of one tenth of one mill for the years 1943, 1944, 1945, 1946 and 1947, upon all the taxable property in the state, except intangibles, for the purpose of reimbursing the permanent school fund

> for all losses sustained therein, as reported by the Auditor of Public Accounts to the Board of Educational Lands and Funds on December 21, 1942, and by such board to the Legislature, in the amount of $503,929.10."

If the rule followed by the trial court is permitted to stand, this court is adopting a construction of the State Constitution and statutes contrary to that placed upon it by the State Supreme Court. These leases will then be in violation of the contract between the State and the federal government; the trust fund will be diminished by the allowance made to the lessees; and a liability will be placed upon the State to this extent, which the State will be under obligation to meet through taxation of its citizens. The only manner in which the State can be made whole is payment of the full value of the land taken. The liability created upon the State through diminution of the trust fund is a property right, which under the Fifth Amendment to the Federal Constitution must be paid for.

In *Town of Bedford* v. *United States of America*, 23 F. (2d) 453, 56 A. L. R. 360, a similar question arose. In considering the damages to be paid by the United States government for the taking of a public highway, the court said:

> "For present purposes, a town may be regarded as a group of taxpayers, charged, inter alia, with the burden of building and maintaining such highways as common convenience and necessity require. Any act that increases those burdens takes additional money from that group of taxpayers. A highway once built exonerates, pro tanto, that group; taken or otherwise destroyed, a new burden is imposed.

> *To take the furnished means of meeting a liability imposed by law has the same effect as taking property technically vested; loss accrues.* Bedford's right in Springs road was as real a property right as a leasehold of the same land, or as an abutting owner's right of access to the street. Rigney v. Chicago, 102 Ill. 64; Hart v. Buckner, 5 C. C. A. 1, 2 U. S. App. 488, 54 Fed. 930; Old Colony & F. River R. Co. v. Plymouth County, 14 Gray, 155." (Emphasis supplied.)

The term "just compensation" was defined in *Jefferson County, Tennessee* v. *Tennessee Valley Authority,* 146 F. (2d) 564, as follows:

> "* * * The constitutional phrase 'just compensation' means a full and perfect equivalent for the property taken. Monongahela Navigation Co. v. United States, 148 U. S. 312, 326, 13 S. Ct. 622, 37 L. Ed. 463. Just compensation rests on equitable principles and means substantially that the owner should be put in as good position as he would have been if his property had not been taken or as nearly so as is possible under the given circumstances. United States v. Wheeler Township, supra (8 Cir., 66 F. (2d) 977)."

See also, *Seaboard Air Line Ry. Co.* v. *United States,* 261 U. S. 299, 67 L. Ed. 664, 43 S. Ct. 354, where the court stated:

> "The compensation to which the owner is entitled is the full and perfect equivalent of the property taken. Monongahela Navigation Co. v. United States, 148 U. S. 312, 327, 13 Sup. Ct. 622, 37 L. Ed. 463. It rests on equitable principles, and it means substantially that the owner shall be put in as good position pecuniarily as he would have been if his property had not been taken. United

States v. Rogers, et al., (C. C. A. Eight Circuit) 257 Fed. 397, 400, 168 C. C. A. 437. He is entitled to the damages inflicted by the taking. Northern Pacific Railway Co. v. North American Telegraph Co., (C. C. A. Eighth Circuit) 230 Fed. 347, 352, 144 C. C. A. 489, L. R. A. 1916E, 572, and cases there cited."

Equity demands and the law requires that the State of Nebraska be paid the full value of the land taken in order that she may be placed in as good a position as she would have been if the property had not been taken.

CONCLUSION.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this court of its supervisory powers. The questions of constitutional law and statutory construction raised herein are of the utmost importance, not only to this petitioner but to every state which holds lands in trust for the benefit of its common schools. A writ of certiorari should be granted and this court should review the decision of the lower court and finally reverse it.

Respectfully submitted,

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